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Supreme Court of the United States

OCTOBER TERM, 1984

LEATHERBY INSURANCE COMPANY, a/k/a WESTERN EMPLOYERS INSURANCE COMPANY,
Petitioner,

vs.

MERIT INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Respondent Merit Insurance Company's Brief in Opposition to the Petition for Writ of Certiorari concedes that one of the two grounds relied upon by the court of appeals in dismissing the appeal of petitioner Leatherby Insurance Company ("LIC") did not support dismissal. As to the second ground, Merit has failed to distinguish the cases in other circuits which conflict with the decision below.

I.

Merit explicitly concedes that the dismissal of LIC's 1981 appeal was *not* a voluntary dismissal by LIC but, rather, dismissal of that appeal was the only appropriate step to be taken by the court of appeals once the underlying judgment from which the 1981 appeal had been taken was vacated. (Merit Br. at p. 6). Merit fails to acknowledge the substantial impact of its concession, however. When the court of appeals dismissed LIC's 1984 appeal, it was clearly under the misimpression that LIC had voluntarily dismissed its 1981 appeal and thus had abandoned the issues raised therein. (See Pet. at pp. 7-8). This misimpression was the major—if not the only—factor leading the court below to conclude that LIC's 1984 appeal was "frivolous" and to award damages to Merit under Rule 38 of the Federal Rules of Appellate Procedure.

More importantly, to the extent that the court of appeals viewed LIC's supposed "dismissal" of its 1981 appeal as a strategic or otherwise deliberate decision made in order to permit it to pursue its 1982 motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the court of appeals was wrong. The court of appeals has consistently misunderstood the true sequence of events leading to dismissal of LIC's 1981 appeal (Pet. at p. 7), which misunderstanding resulted in the unjustified "two bites at the apple" charge. (7th Cir. Opn., App. at 4). To the contrary, LIC strictly followed the procedures outlined by the cases and dictated by considerations of judicial efficiency. (Pet. at pp. 6-8).

II.

On the issue of whether LIC was obligated, as opposed to permitted, to raise the reasons originally set forth in its 1981 appeal as grounds for affirmance of the 1982 vacatur of the arbitration award (Pet. at pp. 9-11), Merit begins with the

uncontested proposition that an appellee *may* urge in support of a judgment any matter appearing in the record, whether or not relied upon by the trial court. (Merit Br. at p. 13 and cases cited therein). Merit then attempts to change that well-established principle from one that is discretionary to one that is mandatory by citation to *Raxton Corp. v. Anania Associates, Inc.*, 668 F.2d 622 (1st Cir. 1982). In its Petition, LIC explained why *Raxton* does not govern this case.[1] (Pet. at pp. 9-10). Merit does not directly respond to the distinctions drawn by LIC (Merit Br. at pp. 15-16), presumably because it does not have persuasive arguments to the contrary.

Next, Merit retreats behind another well-established but equally inapposite rule: when a trial court judgment is correct, it must be affirmed even though the trial court gave a wrong reason for its judgment. (Merit Br. at p. 16). This rule has nothing whatsoever to do with the question of what grounds an appellee *must*, rather than *may*, raise in support of a judgment. In any event, even if this rule were relevant, it would not support Merit's position. As LIC pointed out in its Petition (p. 10 n.*), several of the issues raised by LIC in its 1981 appeal were not directly supportive of the vacatur of the arbitration award as void ab initio and thus could not have been asserted to defend the particular judgment then on appeal.

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[1] Merit's additional citation to *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), and *Richardson v. Communications Workers of America*, 486 F.2d 801 (8th Cir. 1973), does not help its position. In *Alioto*, the defendant's failure to challenge through cross-appeal an adverse finding in an otherwise favorable judgment, his acquiescence in that finding in two subsequent trials and his reliance on it in proposed jury instructions constituted waiver through acquiescence. This is a situation inapposite to LIC's case, where no adverse finding *existed* at the time of the 1982 appeal. Similarly, in *Richardson*, the court found that co-defendants who appealed an adverse judgment on grounds of failure to exhaust administrative remedies could not, on a *second* appeal, claim for the first time that the trial court should have severed the question of each defendant's liability.

There is simply no justification—in case law or in any reasonable view of what constitutes orderly judicial procedure—to require LIC to have raised as appellee its challenges to a non-existent judgment or risk losing forever the right to appellate resolution of those challenges.

III.

Merit fails in its attempts to explain away the conflicts between the court of appeals' decision below and the decisions of two other circuits. First, Merit argues that *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981), (Pet. at pp. 11-12), does not conflict with the decision below. According to Merit, the fact that the *Conway* trial court had not passed on the alternative ground for the plaintiff-appellant's motion for new trial made that ground an inappropriate basis for decision by the court of appeals, indicating that the court, in effect, excused the plaintiff's failure to raise the ground as appellee in the first appeal. (Merit Br. at pp. 18-19). Merit apparently overlooks the fact that, at the time LIC urged affirmance of the 1982 vacatur, there was no extant decision on the issues which had been raised in the 1981 appeal because the trial court had vacated its prior ruling in favor of Merit. Thus, LIC was in a position strikingly similar to that of the plaintiff-appellee in *Conway*, though LIC's treatment by the court of appeals was strikingly dissimilar to that afforded LIC's counterpart in *Conway*.

Merit also fails to dispel the conflict inherent between the court of appeals' decision below and the recent Tenth Circuit case, *Garcia v. Regents of the University of California*, 737 F.2d 889 (10th Cir. 1984) (Pet. at pp. 12-13). Although *Garcia* did not involve a dispute with as complex a history as this case, the Tenth Circuit anticipated the potential problems facing a party such as LIC who makes a post-trial motion while its appeal is pending. Upon reviewing the alternatives, the Tenth Circuit

chose the procedure followed by LIC in this case as the best means of insuring that the moving party not lose its right to resolution of the issues raised in an initial appeal while pursuing the post-trial motion. That portion of the decision below which characterizes the events which led to the dismissal of the 1981 appeal as a total abandonment of the issues raised therein cannot be reconciled with *Garcia's* view of the identical procedures.

CONCLUSION

For the reasons given herein and in the Petition for Writ of Certiorari, LIC prays that its Petition be granted.

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Respectfully submitted,

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